U.S.

05-752 DEC 7 - 2005

No. 05- OFFICE OF THE CLERK

In the Supreme Court of the United States

MARY TOUVELL,

Petitioner,

v.

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LOUIS A. JACOBS
Counsel of Record
66871 RAYO DEL SOL
DESERT HOT SPRINGS
CALIFORNIA, 92240-1871
(614) 203-1255
(760) 288-2146 FAX

JOHN S. MARSHALL
EDWARD R. FORMAN
MARSHALL AND MORROW LLC
111 WEST RICH STREET
SUITE 430
COLUMBUS, OH 43215-5296
(614) 463-9790
(614) 463-9780

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether the self-care and retaliation provisions of the Family and Medical Leave Act, 29 U.S.C. §§ 2612(a)(1)(D); 2615(a)(1), are proper exercises of Congress's power under Section 5 of the Fourteenth Amendment?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1,2

Reasons for Granting the Petition 2-7

Conclusion 8

Appendix 1a-36a

Appendix A 1a-24a

Appendix B 25a-30a

Appendix C 31a

Appendix D 32a-36a

TABLE OF AUTHORITIES

Cases

Brockman v. Wyoming Department of Family Services, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004) 3, 4, 6

Bryant v. Miss. State Univ., 329 F.Supp. 2d 818, 824 n.4, 827 (E.D. Miss. 2004) 4

Cisneros v. Colorado, 2005 WL 1719755 (D.Colo. 2005) 3

Ex Parte Virginia, 100 U.S. (10 Otto) 339 (1879) 5

Fitzpatrick v. Blitzer, 427 U.S. 445 (1976) 5

Jackson v. Birmingham Bd. of Ed., 125 S.Ct. 1497, 1508 (2005) 5

Katzenbach v. Morgan, 384 U.S. 641 (1966) 5

Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) 3, 4, 6

Malone v. Shenandoah County Dept. of Social Services, 2005 WL 1902857 (W.D. Va. 2005) 4

Montgomery v. Maryland, 72 Fed.Appx. 17 (4th Cir. 2003) 4

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003) 3, 4, 5, 6, 7, 8

Solley v. Big Spring State Hosp., 2004 WL 1553423 (N.D. Tex. 2004) 3, 4

Stephen v. Creal, 2005 WL 1159411 (S.D. Ohio 2005) 3

Tennessee v. Lane, 541 U.S. 509, 518 n.3 (2004) . . . 5

Toeller v. Wisconsin Department of Corrections 296 F.Supp.2d 946 (E.D. Wis. 2003), on *reh'g*, 390 F.Supp.2d 792 (E.D. Wis. 2005) . . 4

Wennihan v. AHCCCS, 2005 WL 1876297 (D. Ariz. 2005) 3

Constitution, statutes and regulations

28 U.S.C. § 1254 . . . . . 1, 2

28 U.S.C. § 1291 2

29 U.S.C. § 2601(a)(6); (b)(4); 5 4

29 U.S.C. § 2612(a)(1)(D) 1

29 U.S.C. § 2615(a)(1) 1

Fed. R. App. 4 2

Fed. R. Civ. P. 12(b)(1) 1

S.Rep. No. 102-68 at 35 (1991) 4

Fair Labor Standards Act

29 U.S.C. § 203(c)-(e)(2)(C);(x) . . . . . App. D at 32a

Family and Medical Leave Act Provisions

29 U.S.C. § 2601 . . . . . App. D at 33a

29 U.S.C. § 2611(3); (4)(A);(B) . . . . . App. D at 34a

29 U.S.C. § 2612(a)(1) . . . . . App. D at 35a

29 U.S.C. § 2615 . . . . . App. D at 36a

Miscellaneous

The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong. 36, 42 n.48 (1986) 5

U.S. Constitution

Amend. XI . . . . . App. C at 31a

Amend. XIV, Sections 1 and 5 . . . . . App. C at 31a

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-24a) is reported at *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 422 F.3d 392 (6th Cir. 2005). The opinion of the district court, *Touvell v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, No. 2-04-250 (S.D. Ohio 2004)(App. A., *infra*, 21a-30a,), is unreported.

JURISDICTION

The court of appeals entered its judgment on September 9, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Appendices C and D, *infra*, 31a-36a.

STATEMENT OF THE CASE

On April 2, 2004, Mary Touvell, the Petitioner, timely filed a Family and Medical Leave Act (FMLA) lawsuit in the Southern District of Ohio alleging that her discharge by the Ohio Department of Mental Retardation and Developmental Disabilities ("Department") violated the FMLA by depriving her of an unpaid leave for self-care, 29 U.S.C. § 2612(a)(1)(D), and retaliating against her for asserting her FMLA rights. 29 U.S.C. § 2615(a)(1). On July 30, 2004, the Department's motion to dismiss for lack of subject matter jurisdiction, *Fed. R. Civ. P.* 12(b)(1), was granted by the District Judge on the sole ground that the FMLA's abrogation

of the States' Eleventh Amendment immunity was unconstitutional.

A timely Notice of Appeal was filed, pursuant to 28 U.S.C. § 1291 and *Fed. R. App.* 4, on August 10, 2004. On September 9, 2005, a panel of the Court of Appeals for the Sixth Circuit affirmed dismissal on the sole ground that the FMLA was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. Rehearing *en banc* was not sought.

Petitioner was an unclassified Therapeutic Program Worker (TPW) employed at the Cambridge Developmental Center, an institution for individuals with severe and profound mental retardation which was operated by the Ohio Department of Mental Retardation and Developmental Disabilities. *Complaint*, ¶¶ 2;3. In her position, Ms. Touvell had to lift patients, and during her first year on the job she started to experience back problems. *Complaint*, ¶¶ 4-6.

On or about September 5, 2003, Ms. Touvell's physician excused her from work because of her back pain. *Complaint*, ¶¶ 7;8. She returned to work on September 16, 2003, but lifting continued to cause her pain, and her physician then excused her from work for the period from September 19 through October 17, 2003. *Complaint*, ¶ 13. Even though her back problems constituted a serious health condition and she sought FMLA unpaid leave, the Department terminated Ms. Touvell on September 29, 2003, for excessive absenteeism. *Complaint*, ¶ 15.

REASONS FOR GRANTING THE PETITION

The court of appeals held unconstitutional two provisions of an Act of Congress by sharply departing from the analytical

framework prescribed by this Court in *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), where a third provision of the Family and Medical Leave Act (FMLA) was upheld as a constitutional abrogation of Eleventh Amendment immunity. The lower federal courts are in disarray over whether *Hibbs* had any impact on the self-care and retaliation provisions and on the constitutionality of Congress's attempted exercise of Fourteenth Amendment enforcement power. Rather than leave State employees and State employers to sort out the disarray during the next few years, granting this Petition would enable the Court to authoritatively resolve those issues.

1. The court of appeals' decision conflicts with one circuit's decision and decisions of one or more district courts in other circuits, though it comports with another circuit's decision, pre-*Hibbs* decisions in several circuits, and certain district court decisions. Thus, State employees in some jurisdictions may bring FMLA claims against their employer, State employees in the Sixth and the Tenth Circuits may not, and State employees in other circuits face the barrier of pre-*Hibbs* and some district court decisions

The decision of the court of appeals agrees with *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir.2003), *cert. denied*, 540 U.S. 1219 (2004), and certain district court decisions.[1] The FMLA self-care

---

[1] *See Wennihan v. AHCCCS*, 2005 WL 1876297 (D. Ariz. 2005)(applying *Brockman* to self-care provision); *Cisneros v. Colorado*, 2005 WL 1719755 (D. Colo. 2005)(adhering to *Brockman* on self-care provision and extending holding to retaliation provision); *Stephen v. Creal*, 2005 WL 1159411 (S.D. Ohio 2005)(applying district court decision in *Touvell*); *Solley v. Big Spring State Hosp.* 2004 WL 1553423 (N.D. Tex. 2004)(applying *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000), to

provision has, however, been upheld as a constitutional exercise of Fourteenth Amendment enforcement power in *Montgomery v. Maryland,* 72 Fed.Appx. 17 (4th Cir. 2003)(applying *Hibbs* to medical leave for surgery); and *Toeller v. Wisconsin Department of Corrections,* 296 F.Supp.2d 946 (E.D. Wis.2003), *on reh'g*, 390 F.Supp.2d 792 (E.D. Wis. 2005); and the retaliation provision similarly upheld, though in a case involving an employee's prospective maternity, rather than self-care, leave in *Malone v. Shenandoah County Dept. of Social Services*, 2005 WL 1902857 (W.D. Va. 2005).

2. The court of appeals' decision is flatly inconsistent with *Hibbs* because it persists in rejecting deference to the explicit basis of combating sex and pregnancy discrimination that Congress had for enacting the FMLA self-care provision and the tight relationship between the FMLA retaliation provision and both the self-care and family-care provisions. *See* 29 U.S.C. § 2601(a)(6); (b)(4); (5).[2]

---

retaliation provision); *Bryant v. Miss. State Univ.*, 329 F.Supp.2d 818, 824 n.4, 827 (E.D.Miss.2004)(acknowledging "questionable" precedential value of *Kazmeir* and applying *Brockman* to self-care provision).

[2]*See also Hibbs*, 538 U.S. at 738 ("Indeed, in light of the evidence before Congress, a statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object."); *S.Rep. No. 102-68* at 35 (1991)("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability."); *The Parental and Medical Leave Act of 1986: Joint Hearing on H.R. 4300 Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on*

In *Hibbs* and *Tennessee v. Lane*, 541 U.S. 509, 518 n.3 (2004), the original analytical framework for measuring exercises of enforcement power under the Fourteenth Amendment when heightened scrutiny is afforded the classification or right was restored. In *Ex Parte Virginia,* 100 U.S. (10 Otto) 339 (1879), the Court deferred to a rational congressional judgment that legislation enforced the Fourteenth Amendment. That framework was confirmed in *Katzenbach v. Morgan,* 384 U.S. 641 (1966), where the Court recognized that Congress may enforce the Fourteenth Amendment by prophylactic regulation of conduct which had not been judicially determined in violation of the Equal Protection Clause, and applied to sex discrimination in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976).

Under the *Hibbs* analytical framework, the self-care provision is remedial, not substantive, because sex and pregnancy discrimination receive heightened scrutiny under Section 1 of the Fourteenth Amendment. The court of appeals characterized the FMLA self-care provision as targeting disability discrimination and distinguished *Hibbs* away. Congress's exercise of its Fourteenth Amendment enforcement power must, however, be measured by what Congress perceived and regulated.

The FMLA retaliation provision is integrally related to the self-care and family-care provisions. *See Jackson v. Birmingham Bd. of Ed.*, 125 S.Ct. 1497, 1508 (2005)(retaliation is a form of intentional discrimination). At a minimum, *Hibbs* requires that the retaliation provision of the

---

Education and Labor, 99th Cong. 36, 42 n. 48 (1986)(hiring of female applicants hindered by employer's "assumption that women will become pregnant and leave the labor market").

FMLA be deemed a proper exercise of Fourteenth Amendment enforcement power as to the family-care provision. The decision below thus effectively divides the retaliation provision into separate care compartments, an approach that Congress neither intended nor, given its impracticality, would hardly endorse.

3. A facile syllogism perpetuates pre-*Hibbs* decisions in several courts of appeals, insulating them from the analytical framework established by *Hibbs*. The first premise is that *Hibbs* did not address the self-care or retaliation provisions. The second premise is that prior circuit decisions struck down one or both provisions. The conclusion is that those prior circuit decisions are, therefore, unaffected by *Hibbs*. *See Touvell*, 422 F.3d at 400 ("We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity.") Since *Hibbs*, *Brockman* relied in part on the syllogism. 342 F.3d at 1165 n. 3 ("Some of these decisions have been overruled by *Hibbs* with respect to subsection ©, but the invalidation of the self-care provisions in subsection (D) stands.")(citations omitted). In *Hibbs*, 538 U.S. at 726, the decision cited to reflect a circuit split, *Kazmier v. Widmann,* 225 F.3d 519, 529 (5th Cir. 2000), struck down both the family-care and the self-care provisions.

Unless this Court applies the analytical framework in *Hibbs* to the self-care and retaliation provisions, those circuit decisions will, by operation of the doctrine of *stare decisis* and internal circuit rules on panels being governed by earlier panel decisions, continue to resolve the question presented in this Petition without meaningful recourse to the *Hibbs* analytical framework. This dynamic enshrines a discredited analytical framework.

4. Finally, this case is the proper vehicle for consideration of the question presented.[3] The procedural posture of a motion to dismiss ensures that no factual issues intrude on consideration of the constitutional issue. The sole ground at both the trial and appellate court levels was a negative answer to the question presented.

Reflected in the conflicts among the circuit courts and district courts is the reality that State employees will bring FMLA cases until the question presented is authoritatively resolved. Presumably, as that litigation percolates, a sharper conflict will emerge. Meanwhile, those State employees and their State employers will be devoting time, energy, and money to battling over an issue that would be resolved upon review of this case. Beyond that, should this Court use the *Hibbs* analytical framework to uphold the self-care and retaliation provisions, State employees who would have pursued their FMLA rights before that decision are likely to be thwarted by expiration of the statute of limitations. The question presented should be resolved here and now.

---

[3]After the court of appeals affirmed dismissal of her federal lawsuit and before the FMLA statute of limitations expired, Ms. Touvell filed an FMLA action in the Ohio Court of Claims. The action has barely commenced. In light of that forum's shortcomings, such as depriving her of the jury trial provided by the FMLA, Ms. Touvell will secure a stay upon grant of this Petition.

CONCLUSION

To ensure that employees in all 50 States are afforded the same FMLA protection and preserve the standard adopted in *Nevada Dept. of Human Resources v. Hibbs* for measuring Congress's exercise of Section 5 enforcement power, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John S. Marshall (0015160)
(*marshall@ee.net*)
Edward R. Forman (0076651)
(*eforman@ee.net*)
MARSHALL AND MORROW LLC
111 West Rich Street, Suite 430
Columbus, OH 43215-5296
(614) 463-9790
Fax (614) 463-9780

Louis A. Jacobs (0002101)
(*LAJOhio@aol.com*)
Counsel of Record
66871 Rayo Del Sol
Desert Hot Springs, CA 92240-1871
(614) 203-1255
Fax (760) 288-2146

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-4011

[Filed September 9, 2005]

Mary Touvell Plaintiff-Appellant, v. Ohio Dept. of Mental Retardation and Development, Defendant-Appellee.	)))))))))

OPINION

BOGGS, Chief Judge.

Mary Touvell appeals the district court's dismissal for lack of subject matter jurisdiction of her claim against the Ohio Department of Mental Retardation and Developmental Disabilities ("the Department") under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§§§ 2601 *et seq.* The district court held that the FMLA's purported abrogation of Ohio's Eleventh Amendment immunity was unconstitutional as it related to the "self-care" provision of the FMLA under

which Touvell sought leave, and that Ohio was accordingly immune from suit. For the reasons that follow, we affirm the judgment of the district court.

I

Mary Touvell was an unclassified Therapeutic Program Worker employed at the Cambridge Developmental Center, an institution for the mentally retarded operated by the Department. There is no dispute that the Department is a state agency for the purpose of Eleventh Amendment immunity analysis.

Touvell began work at the Developmental Center on September 9, 2002. One of her duties was to lift patients. According to her complaint, she began to experience back problems in November 2002. On or about September 5, 2003, Touvell's physician excused her from work because of her back pain. Touvell returned to work on September 16, 2003, but the lifting demands of her job continued to cause her distress, so her physician excused her from work from September 19 through October 17, 2003. Touvell was terminated on September 29, 2003, for excessive absenteeism. Touvell brought this case under the FMLA, alleging that the Department interfered with her entitlement to leave under 29 U.S.C. §§ 2612(a)(1)(D), which requires employers to allow employees to take unpaid leave to care for their own serious health conditions, and that the Department retaliated against her for having taken leave, in violation of 29 U.S.C. §§ 2615(a)(1). For the purposes of this appeal we must assume that Touvell's leave was in fact protected by the FMLA. *See R.S.W.W., Inc. v. City of Keego Harbor,* 397 F.3d 427, 433 (6th Cir.2005) ("In reviewing a motion to dismiss, we must construe the complaint in the light most favorable to the plaintiff ....").

On July 30, 2004, the district court dismissed the case for lack of subject matter jurisdiction, on the sole ground that the FMLA's purported abrogation of Ohio's Eleventh Amendment immunity was unconstitutional. The district court acknowledged that the Supreme Court had held in *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003), that the "family-care" provision of the Act, §§ 2612(A)(1)(C), which entitles employees to take leave to care for seriously ill family members, abrogated state immunity, but held that the reasoning of *Hibbs* did not apply to the "self-care" provision under which Touvell claimed to be entitled to leave. Touvell timely appealed.

II

We review *de novo* the district court's order granting the Department's 395 motion to dismiss on Eleventh Amendment grounds. *See Timmer v. Mich. Dep't of Commerce,* 104 F.3d 833, 836 (6th Cir.1997).

The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment provides a type of sovereign immunity, and deprives the federal courts of jurisdiction to entertain a suit brought by an individual against a nonconsenting State. *See Hibbs,* 538 U.S. at 726, 123 S.Ct. 1972; *Hans v. Louisiana,* 134 U.S. 1, 15, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Congress may, however, abrogate such immunity if it (1) makes its intention to abrogate unmistakably clear in the

language of the statute, and (2) acts pursuant to a valid exercise of its power under §§ 5 of the Fourteenth Amendment. *See Hibbs,* 538 U.S. at 726, 123 S.Ct. 1972. Section 5 of the Fourteenth Amendment grants Congress the power "to enforce" the substantive guarantees of §§ 1 of the Amendment, among them equal protection of the laws, by enacting "appropriate legislation." "Congress may, in the exercise of its §§ 5 power, do more than simply proscribe conduct that [the Supreme Court has] held unconstitutional." *Hibbs,* 538 U.S. at 728, 123 S.Ct. 1972; *see also Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (" 'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' ") (quoting *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 81, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000)). "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs,* 538 U.S. at 727-28, 123 S.Ct. 1972.

It remains the province of the courts, however, to determine the Fourteenth Amendment's substantive meaning and define the substance of constitutional guarantees. *Id.* at 728, 123 S.Ct. 1972. Furthermore, §§ 5 legislation that reaches beyond the scope of §§ 1's specific guarantees must be an appropriate remedy for identified constitutional violations, not "an attempt to substantively redefine the States' legal obligations." *Ibid.* (citing *Kimel,* 528 U.S. at 88, 120 S.Ct. 631). *Hibbs* reaffirmed that we must distinguish appropriate prophylactic legislation from an impermissible redefinition of substantive rights by applying the test set forth in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157,

138 L.Ed.2d 624 (1997): valid §§ 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Hibbs,* 538 U.S. at 728, 123 S.Ct. 1972 (quoting *City of Boerne,* 521 U.S. at 520, 117 S.Ct. 2157).

The clarity of Congress's intent to abrogate state sovereign immunity with regard to the provisions of the FMLA is "not fairly debatable." *Ibid.* The Act enables employees to seek damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," 29 U.S.C. §§ 2617(a)(2), and Congress defined "public agency" to include both "the government of a State or political subdivision thereof" and "any agency of ... a State, or a political subdivision of a State," §§§§ 203(x), 2611(4)(A)(iii). This case therefore turns on whether Congress *396 acted within its constitutional authority when it sought to abrogate the states' immunity for purposes of §§ 2612(a)(1)(D), the self-care provision of the Act under which Touvell claimed to be entitled to leave.

III

In *Sims v. University of Cincinnati,* 219 F.3d 559 (6th Cir.2000), we held that the FMLA as a whole was not a valid exercise of Congress's power under §§ 5 of the Fourteenth Amendment because, while Congress had clearly expressed its intent to abrogate state sovereign immunity, the legislative history of the FMLA "discloses no pattern of discrimination by the States, let alone a pattern of constitutional violations." *Id.* at 564. Rejecting arguments by the United States, an intervenor in the case, that the purpose of the FMLA was to remedy and prevent employment discrimination against women and against individuals with serious health conditions, we stated that "the most relevant legislative history, the

committee reports from the 1993 bill that was finally enacted into law, reveals that Congress had little concern with gender-related discrimination, and none at all with discrimination against persons with serious medical conditions." Rather, we concluded, the legislative history of the Act "suggest[s] that Congress was crafting a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause." *Ibid.*

We acknowledged that "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 120 S.Ct. at 644. But we also noted that *Kimel* "makes clear that Congress may not enact broad prophylactic legislation where it has failed to uncover any significant pattern of unconstitutional discrimination by the States." *Sims,* 219 F.3d at 565. And, because Congress had failed, in our opinion, to uncover such a pattern with regard to the FMLA, we held that the Act was unconstitutionally overbroad. *Ibid.*

We identified two aspects of the FMLA that led to this conclusion. First, we noted that state employers could, consistently with the Fourteenth Amendment, discriminate with regard to employee leave on the basis of gender provided that such discrimination "serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (citing *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)). The FMLA, however, mandates leave for all covered employees, and would therefore prevent forms of discrimination by the states that would not be considered unconstitutional. *Ibid.* Second, we found that the affirmative requirements of the FMLA made

it hard to characterize as a remedial measure: " 'The FMLA's remedy thus is simply not corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.' " *Ibid.* (quoting *United States v. Morrison,* 529 U.S. 598, 625, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000)). We concluded that "[i]n light of the broad scope of its substantive requirements, and the lack of evidence of widespread and unconstitutional gender discrimination by the States, we hold that the FMLA is not a valid exercise of Congress's power under §§ 5 of the Fourteenth Amendment." *Id.* at 566.

Other circuits courts reached similar conclusions. The Third and Eighth Circuits agreed with us that the entire Act 397 was unconstitutional. *See Townsel v. Missouri,* 233 F.3d 1094, 1095 (8th Cir.2000); *Chittister v. Dep't of Cmty. and Econ. Dev.,* 226 F.3d 223, 229 (3d Cir.2000). The Fifth Circuit held that neither subsection (C) nor subsection (D) of §§2612(a)(1) constitutionally abrogated state sovereign immunity. *See Kazmier v. Widmann,* 225 F.3d 519, 526-27, 529 (5th Cir.2000). And, most significant for the resolution of this appeal, the First, Second, Fourth, and Eleventh Circuits found only the Act's self-care provision, found in §§ 2612(a)(1)(D), unconstitutional. *See Laro v. New Hampshire,* 259 F.3d 1, 17 (1st Cir.2001); *Lizzi v. Alexander,* 255 F.3d 128, 136 (4th Cir.2001), *cert. denied,* 534 U.S. 1081, 122 S.Ct. 812, 151 L.Ed.2d 697 (2002), *reh'g denied,* 535 U.S. 952, 122 S.Ct. 1352, 152 L.Ed.2d 254 (2002); *Hale v. Mann,* 219 F.3d 61, 69 (2d Cir.2000); *Garrett v. Univ. of Ala. Bd. of Trs.,* 193 F.3d 1214, 1219 (11th Cir.1999), *rev'd on other grounds,* 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The Ninth Circuit, however, held that one provision of the Act, the family-care leave requirement of §§ 2612(a)(1)(C), did constitute a valid exercise of Congress's power to abrogate state sovereign immunity. *Hibbs v. HDM*

Dep't of Human Res., 273 F.3d 844, 873 (9th Cir.2001), *aff'd*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003). The Ninth Circuit acknowledged that "[w]e do not mean here to state any view with regard to the personal disability provision of the FMLA." *Id.* at 868.

Subsequently, the Supreme Court held in *Hibbs* that an action against a state under §§ 2612(a)(1)(C) was not barred by the Eleventh Amendment. That section of the FMLA provides for leave to permit the employee to care for a spouse, child, or parent who has a serious health condition. The Court held that the Act was intended by Congress to protect a right guaranteed by the Equal Protection Clause, namely the right to be free from gender-based discrimination in the workplace. *Hibbs*, 538 U.S. at 728, 123 S.Ct. 1972; *see also* 29 U.S.C. §§ 2601(a)(5) ("due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."); §§§§ 2601(b)(4) & (5) ("to accomplish the [Act's other] purposes ... in a manner that ... minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available ... on a gender-neutral basis[,] and to promote the goal of equal employment opportunity for women and men ....").

The Supreme Court found that Congress had in fact identified a pattern of gender discrimination on the part of the states: "[T]he States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §§ 5 legislation." *Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 953. This finding was premised on the heightened level of scrutiny triggered by the

gender discrimination identified by Congress. *Id.* at 736, 123 S.Ct. 1972. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test--it must 'serve important governmental objectives' and be 'substantially related to the achievement of those objectives,'--it was easier for Congress to show a pattern of state constitutional violations." *Ibid.* (internal citations omitted).

The Court then turned to the constitutionality of Congress's chosen remedy for this pattern of discrimination. Whereas we had held in *Sims* that the absence of evidence of discrimination limited the permissible scope of the remedial provisions 398 of the Act, the *Hibbs* Court held that because Congress was confronting the "difficult and intractable problem" of gender discrimination, and because previous legislative attempts to tackle this problem--such as Title VII of the Civil Rights Act and the amendment of Title VII by the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000e(k)--had failed, Congress was justified in employing broader prophylactic measures than would otherwise be permissible. *Hibbs,* 538 U.S. at 737, 123 S.Ct. 1972. Given this license to fill in the gaps, as it were, of Title VII, the Court held that "Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation.' " *Ibid.* (quoting *Garrett,* 531 U.S. at 374, 121 S.Ct. 955.)

In so holding, the Court rejected both of the rationales we gave in *Sims* for finding the Act's prophylactic provisions overly broad. First, the Court rejected the argument--advanced by the *Hibbs* dissent--that the FMLA is an impermissible "substantive entitlement program" rather than a remedial statute because it establishes a floor of 12 weeks of leave. *Ibid.* "Congress 'is not confined to the enactment of legislation

that merely parrots the precise wording of the Fourteenth Amendment,'" the Court stated, "but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.' *Ibid.* (quoting *Kimel,* 528 U.S. at 81, 120 S.Ct. 631). The Court likened the FMLA's leave requirement to the literacy test ban and preclearance requirements of the Voting Rights Act, and noted that a statute "that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all." *Id.* at 737-38, 123 S.Ct. 1972.

Second, the Court noted that the Act was not overbroad, but was "narrowly targeted at the fault line between work and family--precisely where sex-based overgeneralization has been and remains strongest--and affects only one aspect of the employment relationship," namely the administration of leave benefits. *Id.* at 738, 123 S.Ct. 1972. Furthermore, the demands the Act places on employers are limited in various ways,[1] which "tend to ensure Congress' means are

---

[1] For example, the FMLA requires only unpaid leave, 29 U.S.C. §§ 2612(a)(1), and applies only to employees who have worked for an employer for at least one year and provided 1,250 hours of service within the last 12 months, §§ 2611(2)(A). Employees in high-ranking or sensitive positions are ineligible for FMLA leave; and, "of particular importance to the States," *Hibbs,* 538 U.S. at 739, 123 S.Ct. 1972, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. 29 U.S.C. §§§§ 2611(2)(B)(i) & (3), 203(e)(2)(C). Employees must give advance notice of foreseeable leave, §§ 2612(e), and employers may require certification by a health care provider of the need for leave, §§ 2613. "In choosing 12 weeks as the appropriate leave floor, Congress chose a middle ground, a period long enough

proportionate to ends legitimate under §§ 5." *Ibid.* (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 647, 119 S.Ct. 2199, 144 L.Ed.2d 575 (1999)).

IV

The question before us is whether the Supreme Court's holding in *Hibbs* that the family-care provision of the FMLA abrogates state sovereign immunity requires the same holding in this case with regard to the self-care provision of the Act. In 399 *Brockman v. Wyoming Department of Family Services,* 342 F.3d 1159 (10th Cir.2003), *cert. denied,* 540 U.S. 1219, 124 S.Ct. 1509, 158 L.Ed.2d 155 (2004), the only federal court of appeals case to examine this question in any detail, [2]

---

to serve the needs of families but not so long that it would upset the legitimate interests of employers." *Hibbs,* 538 U.S. at 739, 123 S.Ct. 1972 (internal quotations omitted).

[2] In *Montgomery v. Maryland,* 72 Fed.Appx. 17 (4th Cir.2003) (unpublished), the Fourth Circuit affirmed the dismissal of an FMLA case for failure to state a claim, and stated in dicta that "[i]n [*Hibbs*], the Supreme Court held that Congress effectively abrogated the states' *Eleventh Amendment* immunity against causes of action based on the FMLA ... sovereign immunity does not protect the states in FMLA actions." *Id.* at 19 (emphasis in original). A previous opinion issued in the same case indicates that Montgomery had taken leave under the self-care provision of the Act. *See Montgomery v. Maryland,* 266 F.3d 334, 336 (4th Cir.2001) ("Montgomery took extended leave under the Family Medical Leave Act (FMLA) to have a scheduled surgical procedure."). The Fourth Circuit gave no explanation for this statement, however, and we do not consider it persuasive.

In *Toeller v. Wisconsin Department of Corrections*, 296 F.Supp.2d 946 (E.D.Wis.2003), the United States District Court for the Eastern District of Wisconsin held that, in light of *Hibbs*, the self-care provision of the FMLA was a valid abrogation of state immunity. *See id.* at 950. The court reasoned that the self-care provision was intended to combat discrimination against women because Congress was concerned that single parents, "who in most cases are women,"might lose their jobs if unable to work due to serious illness. *See id.* at 949. The court did not point to any evidence, however, for its apparent assumption that single mothers, or women in general, are more likely to suffer from serious illness than men, or to lose their jobs if so indisposed. *Cf. Brockman*, 342 F.3d at 1164 (stating that the legislative history of the FMLA does not identify any link between gender discrimination and discrimination against those with serious illness). As discussed *infra*, it would be "inappropriate and incorrect" in light of *Hibbs* 's insistence that Congress was required to--and did--adduce evidence of pervasive gender-discrimination by the states with regard to family-leave, to justify the self-care provision of the Act solely on the basis of the possibility that such discrimination might also impact self-care leave, without any concrete evidence of such a link. *See Bryant v. Miss. State Univ.*, 329 F.Supp.2d 818, 827 (N.D.Miss.2004). In *Bryant*, the United States District Court for the Northern District of Mississippi agreed with the analysis of §§ 2612(a)(1)(D) in *Brockman*, and held that "the self-care provision is not a congruent or proportional remedy for gender discrimination." *See id.* at 827.

Finally, in *Lizzi v. Washington Metropolitan Area Transit Authority*, 384 Md. 199, 862 A.2d 1017 (2004), *cert. denied*, --- U.S. ----, 125 S.Ct. 2919, 162 L.Ed.2d 297 (2005), the (Supreme Court of Maryland "agree[d] with ... *Brockman* insofar as it relates to the effect that the Supreme Court's decision in *Hibbs* has on the personal-leave provision of the FMLA, i.e., that it does not have any effect on that particular provision."), and declined, on the basis of the *res judicata* effect of *Lizzi v. Alexander*, 255 F.3d 128 (4th

the Tenth Circuit held that the self-care provision of the FMLA does not constitute a valid abrogation of state sovereign immunity. *Id.* at 1165. The Tenth Circuit noted that the *Hibbs* Court had focused exclusively on the gender discrimination that motivated Congress's enactment of the FMLA, and had premised its holding that the family care provision of the Act abrogated state sovereign immunity "squarely on the heightened level of scrutiny afforded gender discrimination." *Id.* at 1164. Unlike the family-care provision, the *Brockman* court found, the self-care provision was not motivated by a concern to eliminate gender discrimination, but rather by a desire to alleviate the economic burdens to employees and their families of illness-related job-loss, and to prevent discrimination against those with serious health problems. *Ibid.* As a result, the *Brockman* court concluded that "[b]ecause the Supreme Court's analysis in *Hibbs* turned on the gender-based aspects of the FMLA's §§ 2612(a)(1)(C), the self-care provision in subsection (D) is not implicated by that decision." *Ibid.* The 400 Tenth Circuit also agreed with the First Circuit, however, that even if the self-care provision were to be given the benefit of the heightened standard of review for gender-based discrimination, "we do not find that the legislative history sufficiently ties the FMLA's personal medical leave provision to the prevention of gender-based discrimination." *Ibid.* (quoting *Laro,* 259 F.3d at 11). In fact, the *Brockman* court held, "there is no showing ... that establishes any nexus between gender-neutral medical leave for one's own health conditions and the prevention of discrimination on the basis of gender on the part of states as employers." *Id.* at 1165 (quoting *Laro,* 259 F.3d at 11).

Cir.2001), to "select between the conflicting positions of the several federal courts" as to the self-care provision. *See id.* at 1024-25.

As explained below, we agree with the Tenth Circuit that the Supreme Court's holding in *Hibbs* does not apply to the self-care provision of the FMLA, and that private suits for damages may not be brought against states for alleged violations of the Act arising from claimed entitlement to leave under §§ 2612(a)(1)(D).

V

We do not believe that *Hibbs* undermines the holdings of the First, Second, Fourth, Tenth, and Eleventh Circuits that the self-care provision of the FMLA is unconstitutional insofar as it purports to abrogate state sovereign immunity.[3]

---

[3] Touvell argues that the FMLA should be treated as a whole, because by considering the self-care provision separately, we would be engaged in "linedrawing of a quintessentially legislative character," which would require that we "either assume Congress acted from distinct motivations in each FMLA provision or disregard Congress' overall motivation in the absence of particularized findings for each provision," an assumption that she describes as "unrealistic," and "an affront to the separation-of-powers doctrine." As such, Touvell claims, the Supreme Court's holding in *Hibbs*that the family-care provision of the Act abrogates state immunity entails the same conclusion about the self-care provision, and obviates the need for any further inquiry on our part into the constitutionality of the self-care provision. The Supreme Court has made clear, however, that this type of line-drawing is a valid and necessary function of the courts. *See Tennessee v. Lane*, 541 U.S. 509, 520, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) ("the distinction [between valid and invalid legislation under §§ 5] exists and must be observed ...."). In *Lane*, the Court held that the Eleventh Amendment bar to suit against the states was successfully removed by Title II of the Americans with Disabilities Act ("ADA"). *See* id. at 533-34. In *Garrett*, conversely, the Court had

The holding in *Hibbs* was premised on two distinct conclusions about the family-care provision of the FMLA, neither of which is warranted about the self-care provision of the Act. First, the Court concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §§ 5 legislation." *Hibbs,* 538 U.S. at 735, 123 S.Ct. 1972. All of the evidence of discrimination cited in *Hibbs* concerned discrimination based on the belief that women are more likely than men to take leave to care for other family-members. *See id.* at 729 n. 2, 123 S.Ct. 1972 ("Congress found that, 'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'") (internal citation omitted); *id.* at 730-31, 123 S.Ct. 1972 (citing evidence of overt discrimination in the maternity and paternity leave benefits offered by both private and public employers); *id.* at 732, 123 S.Ct. 1972 (citing evidence that even facially neutral policies were applied in a *401 discriminatory way, namely "serious problems with the discretionary nature of family leave"); *id.* at 736, 123 S.Ct. 1972 (identifying the "impact of the discrimination targeted by the FMLA" as the "denial or curtailment of women's employment opportunities [due to] to the pervasive presumption that women are mothers first, and workers second.") (internal citation omitted). There is no evidence that the states engaged in similar gender discrimination with regard to personal medical leave.

---

held that Title I of the ADA did not constitute a valid abrogation of the states' Eleventh Amendment rights. *See* 531 U.S. at 374, 121 S.Ct. 955.

Second, the Court concluded that, given the heightened scrutiny to which gender discrimination is subject, the family-care leave provision of the FMLA is congruent and proportional to the targeted violation, i.e. gender discrimination by the states regarding family-care leave. *Id.* at 737, 123 S.Ct. 1972. Accordingly, the Court made clear in *Hibbs* that the remedy it found congruent and proportional to that type of discrimination was "the family-care leave provision of the FMLA." *Ibid.; see also ibid.* ("By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men."). There is no evidence that the self-care provision of the Act would have any remedial or prophylactic effect on the discrimination identified by Congress.

As an initial matter, it does not appear that Congress even intended to remedy gender-based discrimination with the self-care provision of the FMLA. As both the *Brockman* and *Laro* courts found, the legislative history of the FMLA suggests two motivations for the inclusion of the self-care provision. One purpose of that provision was alleviating the economic burdens on employees and their families of illness-related job loss. *See* S.Rep. No. 103-3, at 11 (1993) ("The fundamental rationale for [a personal medical leave] policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working. Job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household."); *see also* H.R.Rep. No. 101-28(I), at 23 (1989) ("The temporary medical leave

requirement is intended to provide basic, humane protection to the family unit when it is most in need of help. It will also help reduce the societal cost born [sic] by government and private charity."). As noted in *Laro,* "[t]his concern clearly goes to Congress's power under the Commerce Clause and not Section 5." 259 F.3d at 12.

The other purpose of the self-care provision was to prevent employment discrimination against those with serious health problems. *See* S.Rep. No. 103-3, at 12 (citing testimony that a quarter of all cancer survivors face "some form of employment discrimination" and that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disabilities payments"); H.R. Rep. 101-28(I), at 23 ("[A] worker who has lost a job due to a serious health condition often faces future discrimination in finding a job which has even more devastating consequences for the worker and his or her family."). While discrimination against the disabled and seriously ill may indeed be devastating to those affected, the Supreme Court made clear in *Garrett* that such discrimination does not provide sufficient basis for a congressional abrogation of the states' Eleventh Amendment immunity. *See Garrett,* 531 U.S. at 368-74, 121 S.Ct. 955. Congress identified no link between the desire 402 to provide a safety net for the seriously ill, or the desire to prevent discrimination against the seriously ill, and any pattern of discriminatory stereotyping on the part of the states as employers.

Whatever the actual intent of the self-care provision of the Act, Congress adduced no evidence of a pattern of discrimination on the part of the states regarding leave for personal medical reasons sufficient to permit the abrogation of state sovereign immunity. Such evidence of discrimination must be "linked through some nexus not just to such gender-

based problems in society at large, but specifically to unconstitutional gender discrimination by states in their capacity as employers." *Laro,* 259 F.3d at 12; *see also Garrett,* 531 U.S. at 369, 371, 121 S.Ct. 955 (noting that although Congress had identified substantial evidence of societal discrimination against the disabled, "the great majority of these incidents do not deal with the activities of States," and rejecting the argument of the dissent that the Court could "infer from Congress' general conclusions regarding societal discrimination against the disabled that the States had likewise participated in such action").

Although Congress did cite sufficient evidence that the states had engaged in gender discrimination on the basis of unwarranted stereotypes about the role of women as caregivers, that evidence is not sufficient to justify the self-care provision of the Act, because there is virtually no evidence that those stereotypes also concern the behavior of men and women regarding personal medical leave. Indeed, the evidence suggests just the contrary. *See* H.R.Rep. No. 101-28(I), at 15 ("Recent studies ... indicate that men and women are out on medical leave approximately equally. Men workers experience an average of 4.9 days of work loss due to illness or injury per year, while women workers experience 5.1 days per year. The evidence also suggests that the incidence of serious medical conditions that would be covered by medical leave under the bill is virtually the same for men and women. Employers will find that women and men will take medical leave with equal frequency."); *see also* Laro, 259 F.3d at 11-12 ("The argument that [the self-care] provision validly abrogates New Hampshire's Eleventh Amendment immunity founders on this lack of congruence between the personal medical leave provision at issue here and the prevention of gender-based discrimination by states as employers, because Congress has not found the states to have engaged in the

specific gender-based discriminatory practices this provision was designed to prevent."); *Bryant v. Miss. State Univ.*, 329 F.Supp.2d 818, 827 (N.D.Miss.2004) ("There is no indication that women require more actual personal medical leave than men. Nor is there any evidence that women have suffered disparate treatment due to a false perception that they require more personal medical leave than men.... [T]here is simply no evidence to this Court's knowledge that women and men have been subjected to different standards for personal medical leave."). *But see* 1987 Senate Labor Hearings, pt. 2, at 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago) ("the lack of uniform parental *and medical* leave policies in the work place has created an environment where discrimination is rampant.") (emphasis added). Touvell even concedes this very point. *See* Appellant's Br. at 29 ("Statistics on the incidence of loss of work due to medical reasons, including pregnancy-related medical reasons, show that men and women are out on medical leave approximately equally[.]") (citing National Center for Health Statistics, Disability Days, 403 United States, 1980 (Series 10, No. 143, DHH8 Pub. No. (PHS) 83-1571) (1983)).

Touvell contends that personal medical leave is impacted by gender-based discrimination because of the gender-specific incidence of pregnancy-related illness and disability. She points to references to pregnancy-related conditions in the FMLA's legislative history, *see* S.Rep. No. 1033, at 29 (including as examples of serious medical conditions such as ongoing pregnancy, miscarriages, complications or illness related to pregnancy, including severe morning sickness, the need for prenatal care, and recovery from childbirth), as well as in the text of the Act, *see* 29 U.S.C. §§ 2601(b)(4) (among the purposes of the FMLA is "minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring

generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis.").

The fact that the health conditions for which leave would be available under the Act *include* pregnancy-related illness does not mean, however, that pregnancy-related conditions were a more significant focus of the Act than any other conditions that would cause men and women to take leave. The legislative history of the Act suggests that Congress had many such conditions in mind. For example, the same Senate Report that lists various pregnancy-related conditions as examples of medical conditions that would be covered under the self-care provision also lists thirteen other types of condition, including heart conditions, strokes, "most cancers," and accidents on or off the job. *See* S.Rep. No. 103-3, at 29; *see also, e.g., id.* at 12-13 (citing testimony that a quarter of all cancer survivors face "some form of employment discrimination"). Nor does it mean that Congress had evidence that the states in particular were discriminating against women in allocating personal leave. Absent such evidence, Congress may not abrogate state immunity from suit. *See Hibbs,* 538 U.S. at 729, 123 S.Ct. 1972; *see also Laro,* 259 F.3d at 13 (considering argument that the self-care provision combats discrimination on the basis of pregnancy, and stating that "there is no indication that Congress found such a problem on the part of states as employers"); *id.* at 15-16 ("the Eleventh Amendment requires greater information from Congress as to whether [the risk of states discriminating as employers on the basis of pregnancy-related conditions] is real.").

In the absence of any evidence of discrimination relating to personal medical leave, the self-care provision of the FMLA cannot be justified as a remedy for that type of discrimination. The only way it could be justified, then, is if

the self-care provision were a prophylactic measure necessary to effectuate the broader anti-discriminatory purposes of the FMLA as a whole. The best argument along those lines is that §§ 2612(a)(1)(D) meets a perceived need not addressed by Title VII and the Pregnancy Discrimination Act ("PDA").

Under the PDA, women may no longer be treated differently in employment because of pregnancy, childbirth, or related medical conditions (or stereotypes about the same). *Laro,* 259 F.3d at 14. Furthermore, if an employer chooses to offer benefit programs, then those programs must cover pregnancy, childbirth, and related medical conditions. Medical insurance and leave policies, if offered to employees, have to cover pregnancy. *Ibid.* In other words, the PDA mandates equivalent treatment of all temporarily disabled workers, including those disabled because of pregnancy-related conditions. However, as the First Circuit noted in *Laro,* the PDA did not meet *404 one arguable social need, because it did not require the provision of pregnancy-related leave by employers who offer no benefit provisions for leave at all. *See* 259 F.3d at 14-15. As such, the argument goes, the self-care provision of the FMLA was needed to ensure that all employers provide leave for medical conditions related to pregnancy. Congress could have simply required leave for pregnancy-related conditions only, but, the argument continues, that would create a disincentive to hire women, or to place them in positions of responsibility, because only women would take advantage of such leave, thereby feeding into the stereotype that "[u]ntil a woman passes the child-bearing age, she is viewed by employers as potentially pregnant." H.R.Rep. No. 95-948, at 6-7 (1978). Therefore, the only way to ensure that women are able to take leave for pregnancy-related conditions without fear of discrimination is to require employers to allow all employees to take leave for health reasons. *See* S.Rep. No. 102-68, at 35 (1991)

("Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy related disability.").

There are several problems with this argument. The first problem is that, as noted above, there is no evidence that Congress was any more concerned when enacting the FMLA with providing leave benefits to pregnant women than with providing benefits for other seriously ill men and women. The second problem is that even if it was true that the self-care provision of the Act was necessary in order to ensure that women can take time off for pregnancy-related conditions without creating an incentive to hire and promote men, there is no evidence that such a goal, however worthy it may be, is designed to combat a pattern of discrimination by state employers. *See Laro,* 259 F.3d at 14-15, 16 (notwithstanding general statement in testimony asserting that public sector leave policies do not vary much from private sector policies, "the only direct evidence regarding the actual leave policies of public sector employees in the legislative record suggests that state employers did not fall into the 'gap' left by the PDA."); *id.* at 13-14 ("There is no showing, however, that establishes any nexus between gender-neutral medical leave for one's own health conditions and the prevention of discrimination on the basis of gender on the part of states as employers."). Although *Hibbs* discusses at length state policies regarding leave taken after the birth of a child, the point of that discussion was not that providing maternity leave for new mothers was a valid goal on the part of Congress in enacting the FMLA, but that equalizing such provisions for men and women was a legitimate goal.

The third problem is that even if the provision of leave for pregnancy-related conditions was designed to remedy or prevent discrimination by public employers, there is no reason to believe that the self-care provision of the FMLA would in fact remove any disincentive to hire women that might otherwise result from a pregnancy-specific provision. In *Hibbs,* the Supreme Court explained that there was concrete evidence that Title VII was not having the desired effect with regard to ending discrimination in the allocation of family-care leave, and that the reason for this failure was the pervasiveness of stereotypes about the role of women as caregivers. *See Hibbs,* 538 U.S. at 737, 123 S.Ct. 1972. The Court also explained exactly how the family-care provision of the Act would solve this problem. By enabling fathers to take leave to care for a 405 newborn or other family-member, the Act would decrease the gap between the incidence of such leave taken by men and women, and thereby reduce the incentive to hire men over women for fear that women would take more time off to care for family-members. *See ibid.* ("By setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.").

With regard to self-care leave, however, there is no evidence that women--either in fact or in stereotype--took more such leave prior to the enactment of the FMLA. Thus, there is no evidence that personal medical leave had ever created a disincentive to hire women. What is more, if such beliefs and the consequent disincentives *had* existed pre-FMLA, the self-care provision of the Act would only make things worse. If employers believe that women were more likely to take personal leave than men, a law mandating the

provision of such leave to all employees would create precisely the type of incentives to hire and promote men that the family-care provision of the Act was designed to prevent.

In conclusion, while *Hibbs* found that Congress had adduced sufficient concrete evidence of discrimination by the states regarding the availability and consequences of family-care leave, there is no equivalent evidence that the self-care provision of the FMLA was intended to, or did, target similar discrimination. On the contrary, the self-care provision appears to have been social legislation designed to protect the seriously ill and their families regardless of gender. While this may be an admirable goal, it is not one that permits Congress to abrogate the Eleventh Amendment immunity of the states from private suit for damages.

V

For the reasons discussed above, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION
No. 2:04-cv-250

[Filed July 30, 2004]

Mary Touvell)
Plaintiff,)
)
v.)
)
Ohio Dept. of Mental Retardation and)
Development,)
Defendant.)
)

OPINION AND ORDER

This is an action filed by plaintiff Mary Touvell against her former employer, the Ohio Department of Mental Retardation and Developmental Disabilities, an agency of the state of Ohio. Plaintiff asserts claims under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §2601 et seq. Specifically, plaintiff alleges that defendant violated the provisions of 29 U.S.C. §2612(a) (I) (D) when it refused to grant her leave for a serious medical condition, and that the defendant also retaliated against her in violation of 29 U.S.C.

§2615(a) (i) for taking medical leave by terminating her employment.

This matter is before the court on the motion of defendant to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) (I) and 12(b) (6) for lack of subject matter jurisdiction and failure to state a claim for which relief may be granted. Defendant asserts that the plaintiff's claims are barred by the Eleventh Amendment.

The Eleventh Amendment denies federal courts jurisdiction to entertain a suit brought by an individual against a nonconsenting state. *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1 (1890). Congress may abrogate the states' Eleventh Amendment sovereign immunity so long as it: (i) unequivocally expresses its intent to abrogate the immunity; and (2) it acts pursuant to a constitutional provision granting Congress the power to abrogate. *Seminole Tribe*, 517 U.S. at 55.

Section 5 of the Fourteenth Amendment is the only provision of the Constitution currently recognized as authority for Congress to abrogate the states' sovereign immunity. *Id.* at 59. Legislation is deemed to enforce this clause when there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). Courts must first identify the Fourteenth Amendment wrong which Congress intended to remedy, and then examine the statute's legislative history to determine whether the statute was in response to a history or pattern of widespread deprivation of constitutional rights protected by the Fourteenth Amendment. *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Education Expense Board v. Colleqe Savings Bank*, 527 U.S. 627 (1999). Applying this

test, the Supreme Court in *Kimel*, 528 U.S. at 650, held that the Age Discrimination in Employment Act ("ADEA") was not a valid exercise of Congress's power under §5 of the Fourteenth Amendment.

In Sims v. University of Cincinnati, 219 F.3d 559 (6th Cir. 2000), the Sixth Circuit examined the FMLA under the standards announced by the Supreme Court to determine whether the FMLA was enacted pursuant to a valid exercise of Congress's power to enforce the Fourteenth Amendment. The FMLA permits eligible employees to take a total of twelve weeks of leave per calendar year: (i) because of the birth of a child of the employee, in order to care for that child, 29 U.S.C. §2612(a) (i) (A); (2) because of the placement of a child with the employee for adoption or foster care, 29 U.S.C. §2612(a) (i) (B); (3) to care for the spouse, child or parent of the employee if that spouse, child or parent has a serious health condition, 29 U.S.C. §2612(a) (i) (C); and (4) because the employee has a serious health condition resulting in the employee's inability to perform the functions of his or her position, 29 U.S.C. §2612(a) (i) (D). *Sims* involved an employee who was granted medical leave due to her own medical condition.

The Sixth Circuit concluded in *Sims* that Congress clearly expressed an intent to abrogate the states' Eleventh Amendment immunity to actions under the FMLA. *Sims*, 219 F.3d at 562. However, the court went on to find that the legislative history of the FMLA "discloses no pattern of discrimination by the States, let alone a pattern of constitutional violations." *Id.* at 564. The Sixth Circuit also noted that the provisions of the FMLA are overbroad, and that the FMLA "is harder than the ADEA to characterize as a remedial measure." *Id.* at 565. The Sixth Circuit concluded, in light of the broad scope of substantive requirements

mandated by the FMLA and the lack of evidence of widespread and unconstitutional gender discrimination by the states, that the FMLA as a whole was not a valid exercise of Congress's power under §5 of the Fourteenth Amendment. *Id.* at 566.

Other circuits have reached the same conclusion, particularly in regard to the self-care provision found in §2612 (a) (I) (D). See, e.g., *Laro v. New Hampshire*, 259 F. 3d 1 (1st Cir. 2001); *Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001); *Townsel v. Missouri*, 233 F.3d 1094 (8th Cir. 2000); *Chisseter v. Dep't of Community & Economic Development*, 226 F.3d 223 (3d Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2d Cir. 2000); *Garrett v. Univ. of Alabama Bd. of Trustees*, 193 F.3d 1214 (11th Cir. 1999), *rev'd on other grounds*, 531 U.S. 356 (2001).

Subsequently, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Supreme Court addressed whether an action against a state under §2612(a) (1) (C) was barred by the Eleventh Amendment. That section of the FMLA provides for leave to permit the employee to care for a spouse, child or parent who has a serious health condition. The Court noted the stereotypes about women's domestic roles, including the role of primary family caregiver, which "fostered employer's sterotypical views about women's commitment to work and their value as employees" and "created a self-fulfilling cycle of discrimination[.]" *Id.* at 736. The Court concluded that "the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving[.]" The Court held since §2612(a) (1) (C) "is congruent and proportional to its remedial objective" and is responsive to, or designed to prevent, unconstitutional

behavior, it constituted a valid abrogation of states' Eleventh Amendment rights. *Id.* at 740.

In *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159 (10th Cir. 2003), the Tenth Circuit addressed the question of whether the holding in *Hibbs* extended to the self-care provision in §2612(a) (1) (D). The court concluded that the self-care provision was "not implicated by that decision." *Id.* at 1164. The court noted that in enacting §2612(a) (i) (D), Congress was attempting to alleviate the economic burdens to the employee and his or her family caused by illness-related job loss, and to prevent those with serious health problems from being discriminated against by their employers. *Id.*, citing S.Rep. No. 103-3, at 11 (19930, *reprinted in* 1993 U.S.C.C.A.N. 3, 13-14. The court then stated, "The legislative history does not, however, identify as the basis for subsection (D) a link between these two motivations and any pattern of discriminatory stereotyping on the part of the states as employers." *Id.* The court went on to hold that subsection (D) did not effect a valid abrogation of state sovereign immunity under the Eleventh Amendment. *Id.* at 1165.

Plaintiff argues that the FMLA should be considered as a whole, and that the decision in *Hibbs* should apply to all FMLA provisions. However, the Supreme Court itself has not employed this totality approach to Eleventh Amendment immunity. For example, in *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Title I of the Americans with Disabilities Act ("ADA") did not constitute a valid abrogation of the states' Eleventh Amendment rights. However, in *Tennessee v. Lane*, _ U.S. _, 124 S.Ct. 1978 (2004), the Supreme Court held that the Eleventh Amendment bar was successfully removed by Title II of the ADA. In so holding, the Court noted that "the

distinction [between valid and invalid legislation under §5] exists and must be observed[.]" *Id.* at 1986.

There is a sufficient distinction between the provisions of §2612(a) (1) (C), the only subsection of the FMLA at issue in *Hibbs*, and §2612(a) (1) (D), the subsection at issue in the instant case, to warrant separate analysis. In regard to §2612(a) (1) (D), the holding of the Sixth Circuit in *Sims* remains the law of this circuit, which this court is bound to follow. However, even if *Sims* is not controlling, this court has carefully considered the arguments made by plaintiff, and finds that they are not well taken. The court agrees with the analyses and conclusions of the Tenth Circuit in *Brockman* and of the many other circuits whose cases are cited above, that §2612(a) (1) (D) does not satisfy the test for Eleventh Amendment abrogation. Since plaintiff's claim under §2612(a) (1) (D) is barred by the Eleventh Amendment, her retaliation claim is also barred, since that claim rests entirely on the FMLA, not on constitutional grounds. *Cf. Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 794095 (6th Cir. 2000) (retaliation claims arise only under Title VII, not under the Constitution).

The defendant's motion to dismiss is granted, and plaintiff's complaint is dismissed due to lack of subject matter jurisdiction.

Date: July 30, 2004 /s/_____

James L. Graham
Chief United States District Judge

APPENDIX C

Constitutional Provisions

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XIV, Sections 1 and 5

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX D

Fair Labor Standards Act Provisions

29 U.S.C. § 203(c)-(e)(2)(C);(x)

Definitions. As used in this chapter –

* * *

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(2)(C) In the case of an individual employed by a public agency, such term means –

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual –

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who –

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or
(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

* * *

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

Family and Medical Leave Act Provisions

29 U.S.C. § 2601

Findings and purposes.
(a) Findings. Congress finds that -
(1) the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly;
(2) it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing and the care of family members who have serious health conditions;
(3) the lack of employment policies to accommodate working parents can force individuals to choose between job security and parenting;
(4) there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods;
(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often

falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and

(6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.

(b) Purposes. It is the purpose of this Act –

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

(4) to accomplish the purposes described in paragraphs (1) and (2) in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and

(5) to promote the goal of equal employment opportunity for women and men, pursuant to such clause.

29 U.S.C. § 2611(3); (4)(A);(B)

(3) Employ; employee; State.

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 203 of this title.

(4) Employer.

(A) In general. The term "employer" –

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes –

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and

(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 203(x) of this title; and

(iv) includes the Government Accountability Office and the Library of Congress.

(B) Public agency.

For purposes of subparagraph (A)(iii), a public agency shall be considered to be a person engaged in commerce or in an industry or activity affecting commerce.

29 U.S.C. § 2612(a)(1)

Leave requirement.

(a) In general.

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or

parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2615

Prohibited acts.

(a) Interference with rights.

(1) Exercise of rights.

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination.

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

(b) Interference with proceedings or inquiries

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

No. 05-752

In the Supreme Court of the United States

MARY TOUVELL,

Petitioner,

v.

OHIO DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM PETRO
Attorney General of Ohio
DOUGLAS R. COLE
State Solicitor
STEPHEN P. CARNEY
Senior Deputy Solicitor
DIANE RICHARDS BREY*
ERIK J. CLARK
Deputy Solicitors
**Counsel of Record*
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Respondent

QUESTION PRESENTED

Whether States retain their Eleventh Amendment immunity against money damages claims under the self-care provision of the Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1)(D), and against related retaliation claims under 29 U.S.C. § 2615(a)(1).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

COUNTERSTATEMENT 2

REASONS FOR DENYING THE WRIT 3

A. The circuit court holdings are unanimous on the issue presented here. 3

B. The decision below does not conflict with the Court's precedent. 4

C. The decision below was correct on the merits. 7

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page(s)**

Bd. of Trs. of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 5, 7

Brockman v. Wyo. Dep't of Family Servs.,
342 F.3d 1159 (10th Cir. 2003) 1, 3

Bryant v. Miss. State Univ.,
329 F. Supp. 2d 818 (E.D. Miss. 2004) 3

City of Boerne v. Flores,
521 U.S. 507 (1997) 5

Hibbs v. HDM Dep't of Human Res.,
273 F.3d 844 (9th Cir. 2001) 6

Kimel v. Fla. Bd. of Regents,
528 U.S. 62 (2000) 5

Montgomery v. Maryland,
266 F.3d 334 (4th Cir. 2001) 3

Montgomery v. Maryland,
2003 WL 21752919 (4th Cir. July 30, 2003) 3, 4

Nevada Dep't of Human Res. v. Hibbs,
538 U.S. 721 (2003) ..... *passim*

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 7

Sims v. Univ. of Cincinnati,
219 F.3d 559 (6th Cir. 2000) 11

Solley v. Big Spring State Hosp.,
2004 WL 1553423 (N.D. Tex. July 12, 2004) 4

Toeller v. Wis. Dep't of Corrs.,
296 F. Supp. 2d 946 (E.D. Wis. 2005) 4

Wennihan v. AHCCCS,
2005 WL 1876297 (D. Ariz. June 30, 2005) 4

Statutes **Page(s)**

29 U.S.C. § 2612(a)(1)(D)
(FMLA self-care provision) ..... *passim*
29 U.S.C. § 2612(a)(1)(C)
(FMLA family-care provision) ..... *passim*
29 U.S.C. § 2615(a)(1)
(FMLA retaliation provision) 10
42 U.S.C. § 2000e
(Pregnancy Discrimination Act) 8

Other Authorities **Page(s)**

H.R. Rep. No. 101-28(I) 8

INTRODUCTION

In *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), this Court held that the *family-care* provision of the Family and Medical Leave Act of 1993 (FMLA) validly abrogates the States' Eleventh Amendment immunity. The provision, 29 U.S.C. § 2612(a)(1)(C), allows qualified employees to take leave to care for *ailing family members*. The Court concluded that the family-care provision was a valid remedy for an established pattern of state discrimination based on a stereotype that women, more than men, take leave *to care for their families*.

In this case, the Sixth Circuit held that the *self-care* provision of the FMLA does not validly abrogate the States' Eleventh Amendment immunity. That provision, 29 U.S.C. § 2612(a)(1)(D), allows qualified employees to take leave to care for *themselves*. The Sixth Circuit concluded that the self-care provision cannot claim any relation to the women-as-caregivers stereotype, nor to any other established pattern of gender discrimination by the states.

The Sixth Circuit's decision does not conflict with any other circuit's holding, as it agrees with the only other circuit to address the self-care provision after *Hibbs*. See *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003), *cert. denied*, 540 U.S. 1219 (2004). Nor does the decision below conflict with *Hibbs* itself, which explicitly and consistently limited its holding and analysis to the family-care provision and the women-as-caregivers stereotype. Finally, the decision is correct on the merits. As Chief Judge Boggs wrote for the Sixth Circuit, "Although Congress did cite sufficient evidence that the states had engaged in gender discrimination [based on] the role of women as *caregivers*, that evidence is not sufficient to justify the *self-care* provision of the Act." Pet. App. at 18a (emphasis added).

Nonetheless, Touvell asks the Court to step in and review this straightforward conclusion. She attempts to

manufacture a circuit conflict out of one line of dicta in a per curiam unpublished opinion, and she accuses the Sixth Circuit of defying the *Hibbs* analytical framework. Neither of these arguments holds weight. If the circuits ever do split on the issue, that day has yet to come. And far from defying *Hibbs*, the Sixth Circuit's analysis is in lockstep with it. Accordingly, the Court should deny the Petition.

COUNTERSTATEMENT

Touvell alleges that the Ohio Department of Mental Retardation and Developmental Disabilities (the Department) violated and interfered with her FMLA right to take leave for self-care by discharging her for taking leave for her personal illness. Complaint ¶¶ 25–35. She alleges that her doctor excused her from work because of back pain. Complaint ¶¶ 7, 8, 13, and that the Department terminated her for excessive absenteeism, notwithstanding her contention that her back pain constitutes a "serious health condition" under the FMLA. Complaint ¶¶ 15, 17. The district court dismissed the complaint, applying *Hibbs* and finding that the self-care provision did not validly abrogate state sovereign immunity. Pet. App. 30a. The district court did not rule that the *entire* FMLA was an invalid exercise of Congress's power under § 5 of the Fourteenth Amendment. Contra Pet. at 1–2. Likewise, the Sixth Circuit affirmed on the same limited ground that the self-care provision did not validly abrogate state sovereign immunity, not because the *entire* FMLA's abrogation was invalid. Contra Pet. at 2.

As Touvell notes, after the Sixth Circuit affirmed the dismissal of her federal-court case, she filed an FMLA action in Ohio's Court of Claims. That suit remains pending. See Pet. at 7 n.3.

REASONS FOR DENYING THE PETITION

A. The circuit court holdings are unanimous on the issue presented here.

The circuits are not split on the question presented. Chief Judge Boggs's unanimous opinion for the Sixth Circuit panel joined the unanimous opinion of the Tenth Circuit in finding that the self-care provision does not validly abrogate Eleventh Amendment immunity. See *Brockman*, 342 F.3d at 1165. No other circuit has published an opinion on the issue after *Hibbs*. Thus, the circuits are unanimous, and indeed, each of the panels in those circuits were unanimous.

Touvell attempts to create a conflict where none exists, claiming that a paragraph of dicta in a three-page per curiam unpublished opinion amounts to a conflict. But that is not the case. In *Montgomery v. Maryland*, 2003 WL 21752919 (4th Cir. July 30, 2003), the Fourth Circuit *dismissed* a self-care FMLA claim for reasons unrelated to state sovereign immunity. *Id.* at *2–3. Nonetheless, with a one-paragraph citation to *Hibbs*, the court summarily dismissed as moot the issue of whether Maryland waived its Eleventh Amendment immunity, offering no reasoning behind its apparent determination that *Hibbs* controlled on the self-care claim in the case. *Id.* at *1. Equally important, the opinion refers only to an "FMLA claim," without even noting that it was a self-care claim. The self-care nature of the claim is apparent only from reading an earlier decision in the case. See *Montgomery v. Maryland*, 266 F.3d 334, 336 (4th Cir. 2001). Thus, the *Montgomery* language was not only dicta in an unpublished decision, but it was unpublished dicta that did not even address the question presented here. That surely fails to carry enough weight to anchor the "other side" of an alleged split, much less one warranting this Court's review.

Moreover, most of the district courts to consider the self-care provision after *Hibbs* have aligned with the circuit court precedent on the issue. See, e.g., *Bryant v. Miss. State*

Univ., 329 F. Supp. 2d 818 (E.D. Miss. 2004); *Wennihan v. AHCCCS*, 2005 WL 1876297 (D. Ariz. June 30, 2005); *Solley v. Big Spring State Hosp.*, 2004 WL 1553423 (N.D. Tex. July 12, 2004). Only one district court has dissented. See *Toeller v. Wis. Dep't of Corrs.*, 296 F. Supp. 2d 946 (E.D. Wis. 2005), *appeal docketed*, No. 05-4064 (7th Cir. Oct. 20, 2005). As the Sixth Circuit noted, however, the district court in *Toeller* "did not point to any evidence [ ] for its apparent assumption that single mothers, or women in general, are more likely to suffer from serious illness than men, or to lose their jobs if so indisposed." Pet. App. 12a.

Finally, even if the brief, non-binding dicta of the Fourth Circuit or the reasoning of the Eastern District of Wisconsin amounts to "disarray," Pet. at 3, this disarray may prove to be fleeting, and is at most fledgling. Indeed, even counting *Montgomery*, we have yet to see among the circuits an in-depth discussion and reasoning to bolster the position Touvell urges here. As Touvell admits in an understatement, "[p]resumably, as [similar] litigation percolates, a sharper conflict will emerge." Pet. at 7. To the extent this issue would ever merit review by this Court, that day has yet to come.

B. The decision below does not conflict with the Court's precedent.

The Sixth Circuit's decision does not conflict with *Hibbs*, because *Hibbs* explicitly and consistently limited its holding and analysis to a different—and fundamentally distinguishable—provision of the FMLA. As *Hibbs* reaffirmed, Congress can abrogate Eleventh Amendment immunity if it makes its intent clear (as it did with the FMLA) and if it acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. Pet. App. 3a–4a (citing *Hibbs*, 538 U.S. at 726). This power includes the power to enforce the substantive guarantee of equal protection through legislation "prohibiting a somewhat broader swath of conduct, including that which is not itself

forbidden by the amendment's text." *Hibbs*, 538 U.S. at 727 (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

And, as the Sixth Circuit recognized, the Court in *Hibbs* continued to adhere to the approach of *City of Boerne v. Flores*, 521 U.S. 507 (1997), to determine whether an act of Congress is valid § 5 legislation. Pet. App. 4a (citing *Hibbs*, 538 U.S. at 728). As the Court summarized:

> *City of Boerne* also confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees. . . . We distinguish appropriate prophylactic legislation from substantive redefinition of the Fourteenth Amendment right at issue by applying the test set forth in *City of Boerne*: Valid § 5 legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Hibbs, 538 U.S. at 728 (citation and quotation marks omitted).

Hibbs found such congruence and proportionality between the family-care provision of the FMLA and the specific injury to be remedied: state employers' participation in "the pervasive sex-role stereotype that caring for family members is women's work," *id.* at 731. Congress sufficiently established a pattern of such discrimination to justify this mandatory leave measure, given the heightened scrutiny that comes with gender discrimination. *Id.* at 736.

The *Hibbs* Court explicitly and consistently limited itself to one specific provision (the family-care provision), which it found a valid remedy for one specific form of discrimination (the stereotype that women, more than men, take time off work to care for family members). To begin,

Hibbs's claim was based on the family-care provision, and no other provision, of the FMLA. *Id.* at 725. Indeed, as the *Hibbs* lower court noted, "[w]e do not mean here to state any view with regard to the personal disability provision of the FMLA." *Hibbs v. HDM Dep't of Human Res.*, 273 F.3d 844, 868 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003). Accordingly, in its announced holding, this Court limited its conclusion to the family-care provision. *Hibbs*, 538 U.S. at 725 ("We hold that employees of the state of Nevada may recover money damages in the event of the State's failure to comply with the *family-care* provision of the Act.") (emphasis added).

And with the same precision, the Court exhaustively analyzed the women-as-caregivers stereotype, to the exclusion of any other theory of discrimination. See, e.g., *id.* at 728 n.2 ("primary responsibility for family caretaking often falls on women"); *id.* at 729 ("woman is . . . the center of home and family life"); *id.* ("having in view not merely her own health, but the well-being of the race"); *id.* at 730 ("stereotype-based beliefs about the allocation of family duties"); *id.* at 731 ("pervasive sex-role stereotype that caring for family members is women's work"); *id.* at 731 n.5 ("women's family duties trump those of the workplace"); *id.* at 736 ("women are mothers first, and workers second"); *id.* ("parallel stereotypes presuming a lack of domestic responsibilities for men"); *id.* at 737 ("Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations by hiring men."). In fact, the Court specifically dismissed the dissent's criticism that including parenting leave statistics in its analysis (in addition to leave to care for ailing family members) improperly widened the scope to "*general* gender-based stereotypes in employment." *Id.* at 749 (emphasis supplied). "To the contrary," the Court responded, "because parenting and family leave address very

similar situations in which work and family responsibilities conflict, they implicate the same stereotypes." *Id.* at 731 n.5.

The question presented in this case, then, is an issue that *Hibbs* specifically left untouched: whether the very different self-care provision is a valid remedy for a different form of discrimination, one based not on family-care stereotypes but instead on personal illness. Thus, regardless of whether the Sixth Circuit correctly decided the case—and it did, as explained below—the Court need not grant certiorari to reaffirm the rule of *Hibbs*.

C. The decision below was correct on the merits.

The Sixth Circuit correctly applied the *Hibbs* analytical framework in concluding that the self-care provision does not validly abrogate Eleventh Amendment immunity. First, the Sixth Circuit began by noting that the Congressional intent of the self-care provision seemed to be unrelated to remedying gender discrimination at all. Instead, Congress sought primarily to "alleviate economic burdens on employees and their families of illness-related job loss," an otherwise valid exercise of Congress's *Commerce Clause* power but one that cannot abrogate state sovereign immunity. Pet. App. 16a–17a; see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). In addition, Congress sought to "prevent employment discrimination against those with serious health problems," but Congress failed, under *Garrett*, to establish a widespread pattern of this kind of discrimination among the States. Pet. App. 17a.

But the Sixth Circuit did not stop there. It also assumed that the self-care provision was in fact designed to remedy some form of gender discrimination, thus triggering heightened scrutiny and allowing Congress additional leeway in establishing such discrimination among the States. Pet. App. 18a–24a; see also *Hibbs*, 538 U.S. at 735–36. The court then compared the evidence and findings of *family-care*

gender stereotyping in *Hibbs* with the dearth of evidence of *self-care* gender stereotyping. Indeed, the Sixth Circuit noted evidence to the contrary. Pet. App. 18a (quoting H.R. Rep. No. 101-28(I), at 15 (indicating that men and women take approximately equal amounts of personal medical leave, and that medical leave is equally available to men and women)).

The Sixth Circuit then dismissed Touvell's contention that personal medical leave includes "gender-specific incidence of pregnancy-related illness and disability." Pet. App. 19a–20a. As the court concluded, among other shortcomings, this truism does not "mean that Congress had evidence that the states in particular were discriminating against women in allocating personal leave." Pet. App. 20a.

Finally, the Sixth Circuit carefully considered and rejected the argument that the self-care provision is valid prophylactic legislation to address a shortcoming of Title VII and the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e. Pet. App. 21a–24a. Specifically, although the PDA required equal leave between men and women, employers could comply by offering no leave at all. "As such, the argument goes, the self-care provision . . . was needed to ensure that all employers provide leave for medical conditions related to pregnancy." Pet. App. 21a. But again, Congress offered no evidence of state discrimination on this basis. Pet. App. 22a. Moreover, the court noted a fundamental difference between this purported remedy and the remedy in *Hibbs*: "By enabling fathers to take leave to care for a newborn or other family member, the [family-care provision] would decrease the gap between the incidence of such leave taken by men and women, and thereby reduce the incentive to hire men over women for fear that women would take more time off to care for family-members." Pet App. 23a. On the other hand, "if employers believe that women were more likely to take personal leave than men, a law mandating the provision of such leave to all employees would create precisely the type of incentives to hire and

promote men that the family-care provision . . . was designed to prevent." Pet App. 23a–24a.

Ultimately, this case is about the simple difference between a statutory provision designed to combat the gender stereotypes regarding who takes leave to care for an ailing family member, and another provision that addresses a different problem—the need for leave when one is personally ill. Combating gender discrimination supports the first provision, but that rationale is simply too tangential to the self-care provision to justify that provision as valid § 5 legislation. Again, of the six circuit judges who have addressed the issue since *Hibbs*, not one has challenged this sound distinction.

In the face of this straightforward conclusion, Touvell offers three arguments, but all three fail. ***First***, she asserts that the Sixth Circuit "characterized the [ ] self-care provision as targeting disability discrimination and distinguished *Hibbs* away." Pet. at 5. Not true. While the Sixth Circuit did conclude—"[a]s an initial matter," Pet App. 16a—that the self-care provision was intended to prevent employment discrimination against those with serious health problems, it then continued its analysis by assuming arguendo that the self-care provision was also an attempt to remedy some form of gender discrimination. The Sixth Circuit's analysis properly afforded Congress the extra leeway that *Hibbs* allowed when dealing with discrimination meriting heightened scrutiny. The Sixth Circuit simply concluded, however, that even with this leeway, Congress failed to establish relevant discrimination by the states. "[I]t would be inappropriate and incorrect, in light of *Hibbs*'s insistence that Congress was required to—and did—adduce evidence of pervasive gender discrimination by the states with regard to family leave, to justify the self-care provision of the Act solely on the basis of the possibility that such discrimination might also impact self-care leave, without any

concrete evidence of such a link." Pet. App. 12a n.2 (quotation marks omitted).

Second, Touvell mistakenly asserts that the Sixth Circuit, by dismissing her entire suit including her retaliation claim under 29 U.S.C. § 2615(a)(1), "effectively divides the retaliation provision into separate care compartments." Pet. at 6. She seems to argue that since the FMLA's single retaliation provision applies to both family-care and self-care claims, a retaliation claim based on the assertion of a self-care claim must survive, even if the underlying self-care claim cannot. But to the extent this argument was even preserved below, if a self-care claim for damages does not overcome Eleventh Amendment immunity, then a retaliation claim for damages *arising from the assertion of a self-care claim* suffers the same fate. Of course, the Sixth Circuit did not have occasion to decide—nor did it decide—whether the retaliation provision is completely invalid, regardless of the underlying right asserted. Nor has the Sixth Circuit somehow rewritten the retaliation provision. Rather, the court affirmed a simple and unavoidable consequence that if a plaintiff cannot get money damages against a State based on a self-care claim, then she cannot get money damages based on her related retaliation claim.

Moreover, this *secondary* issue—retaliation based on a self-care claim—is even less developed among the lower courts than the *primary* issue of the self-care provision itself. Thus, even if Touvell's brief argument on this point could somehow, someday prove meritorious, this undeveloped issue is not certworthy now.

Third, Touvell conjures the specter of a "facile syllogism" that since *Hibbs* does not lead to the conclusion that the self-care provision is a valid abrogation of Eleventh-Amendment immunity, the lower courts can invalidate the provision based solely on their own past precedent "without meaningful recourse to the *Hibbs* analytical framework." Pet.

at 6. Not so. In this case, as described above, the Sixth Circuit invalidated the self-care provision only *after* exhaustively applying the *Hibbs* framework and finding a dearth of evidence that States had discriminated against women when it comes to *personal* sick leave. This narrow holding is a far cry from the court's earlier analysis that in enacting the FMLA *as a whole*, "Congress was crafting a piece of social legislation rather than a remedy for ongoing state violations of the Equal Protection Clause." Pet. App. 6a. (quoting *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 564 (6th Cir. 2000)); see also Pet. App. 9a–10a (acknowledging that the *Hibbs* Court "rejected" this analysis). That *Hibbs* does not command lower courts to uphold the self-care provision does not mean that the lower courts somehow are insulating themselves from this Court's precedent. It is *by applying* this precedent that the result obtains.

In the end, it is Touvell who engages in a flawed syllogism: *Hibbs* upheld abrogation of Eleventh Amendment immunity by the family-care provision of the FMLA. The self-care provision is also a provision of the FMLA. Therefore, she concludes, the self-care provision's abrogation of Eleventh Amendment immunity must be upheld. But unanimous circuit precedent since *Hibbs* has pierced this fallacy. And until a circuit court issues precedent to the contrary, the Court need not, and should not, give guidance.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio

DOUGLAS R. COLE
State Solicitor
STEPHEN P. CARNEY
Senior Deputy Solicitor
DIANE RICHARDS BREY*
ERIK J. CLARK
Deputy Solicitors
*Counsel of Record
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
Counsel for Respondent

January 9, 2006